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No. 95-1860

In the Supreme Court of the United States

OCTOBER TERM, 1995

RODRIGO MARTIN REYES, PETITIONER

v.

IMMIGRATION AND NATURALIZATION SERVICE

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF FOR THE RESPONDENT IN OPPOSITION

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30 pp

QUESTION PRESENTED

Whether the Board of Immigration Appeals abused its discretion in concluding, based on changes in the government of Nicaragua, including an amnesty afforded by that government to army deserters, that petitioner had failed to demonstrate a well-founded fear of persecution.

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1-2) is unpublished, but the decision is noted at 81 F.3d 158 (Table). The opinions of the Board of Immigration Appeals (Pet. App. 3-11, 12-14) are unreported, as is the oral decision of the immigration judge (App., *infra*, 1a-9a).

JURISDICTION

The judgment of the court of appeals was entered on March 1, 1996. The petition for a writ of certiorari was filed on May 16, 1996. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. Petitioner is a native and citizen of Nicaragua. During the Sandinista regime in that country, he was conscripted into the army. He claims to have deserted the army after observing human rights abuses perpetrated by Nicaraguan army officers. He also contends that it was necessary for him to seek asylum in another country because the Nicaraguan authorities persecuted and even killed army deserters. App., *infra*, 4a.

After petitioner entered the United States without inspection in 1989 (Pet. 5), the Immigration and Naturalization Service commenced deportation proceedings against him. Petitioner conceded deportability but requested asylum or withholding of deportation under 8 U.S.C. 1158 and 1253(h), based on his fear of persecution upon return to Nicaragua. By the time of his deportation hearing, the Sandinista party no longer controlled the government of Nicaragua, and President Violeta Chamorro, leader of the former opposition, had formed a government. App., *infra*, 5a-6a.

The immigration judge (IJ) concluded that petitioner had failed to establish a fear of persecution that would entitle him to asylum or withholding of deportation. The IJ noted that fear of conscription, by itself, is not a basis for withholding, since "a sovereign government does have a right to carry on a draft." App., *infra*, 6a (citing *In re Vigil*, 19 I. & N. Dec. 572 (B.I.A. 1988)). The IJ also noted that conscription does not constitute persecution merely because there is no exemption for religious or conscientious objectors. Pet. App. 6a-7a.

The IJ further noted that, even if petitioner could establish that the Sandinista government had carried out its conscription to persecute political opponents, that contention was no longer relevant since the Sandinistas no longer controlled the government, and the Chamorro administration had abolished the draft and announced a general amnesty for draft deserters. App., *infra*, 7a. Petitioner introduced the testimony of Bayardo Jiron, a former high-ranking Nicaraguan security official, to establish that the Sandinistas still controlled the Nicaraguan army, and that the amnesty was not truly effective. The IJ, however, gave Jiron's testimony little weight because Jiron had not been to Nicaragua since 1979. The IJ also noted that the State Department's human rights report on Nicaragua had concluded that the amnesty was effective. *Id.* at 8a.

2. The Board of Immigration Appeals (BIA) affirmed. Pet. App. 12-14. The BIA reaffirmed its prior decision in *Vigil*, *supra*, that punishment for desertion from the armed forces is not persecution unless that punishment is applied on the basis of a qualifying ground for asylum, *e.g.*, race, religion, or political opinion. It also noted that petitioner had failed to rebut the IJ's finding that the draft had been abolished in Nicaragua. *Id.* at 13.

Petitioner filed a motion to reopen and a motion to reconsider before the BIA. The BIA denied both motions. Pet. App. 3-11. With respect to the motion to reconsider, the BIA rejected petitioner's contention that it had erroneously characterized the election of President Chamorro as an improvement in the human rights situation in Nicaragua. Rather, the BIA noted, it had simply adopted the IJ's finding that petitioner had failed to establish that the Nicaraguan

government's amnesty for army deserters was ineffective. *Id.* at 7-8.

With respect to the motion to reopen, the BIA declined to take cognizance of an affidavit submitted by petitioner's mother describing events in Nicaragua occurring in 1989, noting that the affidavit could have been produced at the initial deportation hearing in 1990. Pet. App. 9. The BIA also concluded, upon a review of recent news articles and State Department reports, that there were no changed circumstances since its initial decision rendered six months earlier that would warrant a reexamination of the IJ's conclusion that petitioner had failed to establish a well-founded fear of persecution. The BIA observed that "the conditions described in those documents do not seem to differ much from those obtaining at the time of the hearing," and noted in particular that there was "no evidence of persecution, systemic or episodic, of * * * deserters from the former Sandinista army returning from abroad." *Id.* at 10.

3. The court of appeals affirmed in an unpublished order. Pet. App. 1-2. The court concluded that the BIA's decision denying petitioner's request for asylum was supported by substantial evidence, and that the BIA had not abused its discretion in denying the motion to reopen the asylum proceedings. *Id.* at 2.

ARGUMENT

1. Petitioner contends that the Board of Immigration Appeals (BIA) erred in rejecting his contention that he would be persecuted for his anti-Sandinista views if he were returned to Nicaragua. See Pet. 8. The court of appeals correctly held that the BIA's decision was supported by substantial evidence. That unpublished ruling by the court of appeals presents no

issue of general importance warranting review by this Court.

Petitioner maintained that he deserted the Nicaraguan army because of its human rights abuses, and that the Nicaraguan government would persecute him for his desertion because of his anti-Sandinista views. The immigration judge (IJ), however, took official notice of the fact that the government of Nicaragua had changed, and that the new government had declared a general amnesty for deserters. It is well established that immigration judges and the BIA may take official notice in deportation proceedings of changes in foreign governments and their policies, as long as the alien is given the opportunity to contest the truth and significance of the noticed facts. See *Gutierrez-Rogue* v. *INS*, 954 F.2d 769 (D.C. Cir. 1992); *Rivera-Cruz* v. *INS*, 948 F.2d 962 (5th Cir. 1991).[1]

In this case, petitioner was afforded the opportunity to contest the truth and significance of the change in Nicaraguan policies at his deportation hearing. He introduced the testimony of Bayardo Jiron, a former high-ranking Nicaraguan security official, that a draft still existed in Nicaragua, that the Chamorro government "is really not in control," that the Sandinistas continue to control the army, and that the amnesty was not effective. See App., *infra*, 5a-6a. The IJ found Jiron to be "very honest and very honor-

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[1] There is disagreement among the courts of appeals as to whether due process is satisfied by affording an alien the opportunity to contest such officially noticed facts by means of a motion to reopen presented to the BIA. See *de la Llana-Castellon* v. *INS*, 16 F.3d 1093, 1096 (10th Cir. 1994). That issue is not presented in this case, because petitioner had the opportunity to contest the noticed facts before the IJ, and he in fact did so.

able," but nonetheless gave his testimony little weight because he had not personally been to Nicaragua since 1979. The IJ gave weight, by contrast, to State Department reports indicating that the amnesty was indeed effective. The IJ therefore concluded, based on the evidence, that petitioner had not established eligibility for asylum or withholding of deportation. *Id.* at 7a-8a. Based on the same evidence, the BIA agreed with the IJ's finding that the amnesty was indeed effective, Pet. App. 8, and, as the court of appeals noted, that finding is supported by substantial evidence, *id.* at 2, including the State Department reports.

Petitioner argues that the decision below conflicts with *de la Llana-Castellon* v. *INS*, 16 F.3d 1093 (10th Cir. 1994), but that contention is incorrect. In *Llana-Castellon*, the court of appeals ruled that the alien had been denied a fair opportunity to contest the BIA's rejection of his asylum claim (reversing the decision of the IJ granting asylum) based on officially noticed changes in the government of Nicaragua. The Tenth Circuit concluded, in particular, that the availability of a motion to reopen before the BIA did not satisfy the due process requirement of a fair opportunity to contest the officially noticed facts. In this case, by contrast, petitioner had a full opportunity to contest the noticed facts at an earlier stage in the proceedings, before the IJ. Moreover, the IJ and the BIA in this case based their decisions on all the evidence in the record, not (as the court of appeals suggested in *Llana-Castellon*) "boilerplate" language about changes in Nicaragua. The court of appeals therefore correctly concluded that substantial evidence supported the BIA's rejection of petitioner's asylum

claim. See *INS* v. *Elias-Zacarias*, 502 U.S. 478, 481 (1992).

2. Petitioner presents as a question for review (Pet. i) whether the BIA abused its discretion in rejecting his motion to reopen, but he makes no argument on the merits of that contention. The argument is therefore waived. See Sup. Ct. R. 14.2, 14.4. In any event, the contention is without merit. The BIA declined to reopen the proceedings because it found that petitioner had not introduced any new evidence, not available at the time of the initial proceeding, indicating a material change in circumstances in Nicaragua. Pet. App. 9-10. The BIA has broad discretion to deny motions to reopen, and such motions are disfavored. See *INS* v. *Doherty*, 502 U.S. 314, 323 (1992). In this case, the BIA did not abuse its discretion in concluding that the conditions in Nicaragua described by the proffered documents "do not seem to differ much from those obtaining at the time of the hearing." Pet. App. 10.[2]

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[2] Petitioner contends (Pet. 9) that the BIA was obligated to accept as true the facts stated in the documents supporting his motion to reopen. That contention is certainly not supported by *M.A.* v. *INS*, 899 F.2d 304 (4th Cir. 1990) (en banc), on which he relies. In *M.A.*, the Fourth Circuit squarely rejected the arguments that, on a motion to reopen, "all ambiguities in the factual averments must be resolved in the movant's favor," and that "every inference must be drawn in the [alien's] favor." 899 F.2d at 310; see *INS* v. *Abudu*, 485 U.S. 94, 109-110 (1988).

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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JULY 1996

APPENDIX

UNITED STATES DEPARTMENT OF JUSTICE
EXECUTIVE OFFICE FOR IMMIGRATION REVIEW
OFFICE OF THE IMMIGRATION JUDGE
New Orleans, Louisiana

File No. A 29 322 056

In the Matter of
RODRIGO MARTIN-REYES, RESPONDENT

[Filed: Dec. 13, 1990]

IN DEPORTATION PROCEEDINGS

CHARGE: Section 241(a)(2) of the Immigration and Nationality Act in that you entered the United States without inspection

APPLICATIONS: Political asylum; withholding of deportation pursuant to Sections 208 and 243(h) of the Immigration and Nationality Act; in the alternative voluntary departure

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ORAL DECISION OF THE IMMIGRATION JUDGE

The respondent is a 20 year old married male, native and citizen of Nicaragua. Pursuant to Order to Show Cause, Exhibit #1, the respondent is alleged to have entered the United States on or about the 23rd day of January 1989 near Laredo, Texas in violation of Section 241(a)(2) - entry without inspection. The respondent appeared in an earlier hearing on the 30th day of May 1987 and also on the 23rd day of March 1990 and admitted the allegations in his Order To Show Cause and conceded deportability. He remained silent as to the country of deportation and the Court directed Nicaragua should that become necessary. The respondent asked for relief from deportation in the form of political asylum, withholding of deportation and voluntary departure in the alternative. The proceedings were continued to allow the respondent an opportunity to file the paperwork for relief and that application may be found in Exhibit #2 in the record of proceeding. The application and supporting documents were forwarded to the State Department for an advisory opinion and that advisory opinion may be found in Exhibit #3 in the record of proceeding.

For the purposes of the record Exhibit #1 is the Order To Show Cause; Exhibit #2 is the application for political asylum; Exhibit #3 is the State Department opinion letter, the State Department *Country Reports*, Exhibit #4; 5 is an article from the *Baton Rouge Newspaper*; Exhibit #6 is an article from *Newsweek Magazine*; Exhibit #7 is an excerpt of the law and Exhibit #8 is an excerpt of the United Nations Handbook.

A hearing was held in New Orleans, Louisiana on or about the 13th day of December, 1990 and at that hearing the respondent testified substantially as follows. He stated that he was born in Managua, Nicaragua and lived the majority of his life in Managua, with a brief period of time that he trained as a x-ray technician in the town of Rivas, Nicaragua. The respondent stated that he started becoming involved in politics in his homeland in 1985 when he was approximately 15 years of age. During this time he participated along with the Christian Democratic Youth Organization. During this time he was detained three times, once for a period of two days and they only threatened him, the second time he was detained for nine days and the third time they put him in solitary confinement and was held for two weeks incommunicado, during that time he was hit and given psychological torture. He was however, released because of the fact that he was a minor. He then in a later period of 1986 went to Rivas to study radiology and returned to Managua in 1987 when he went to work for the Ministry of the Interior and did so for approximately a year. He then was forced to join the army, and as they have a draft in Nicaragua he was pulled into the army in the beginning of 1988 and was sent to military training to participate in the ongoing

war. He then said he started noticing the use of drugs and the violation of human rights and the corruption of high ranking officers in the military. He stated there was a drug distribution to the soldiers but they kept most of the drugs so they could sell them and make a profit. The respondent pointed out that he was raised as a christian and could not tolerate being a member of the Sandinista army and he was also afraid that he would be ordered to perform acts against his conscience. He had seen human rights abuses by individuals in the army torturing and killing innocent civilians and abusing them. He stated that he deserted the Sandinista army in January 1 of 1988 and ultimately came to the United States. His purpose in deserting was to leave the Nicaraguan army and to come to the United States to find political asylum. He stated that before deserting he had seen what happened to deserters and he had seen some captured, some killed, some abused and knew that, but nevertheless found it necessary to desert. He ultimately crossed into the border and them came to Baton Rouge and now belongs to a christian community in Baton Rouge.

Now, in order to establish eligibility for withholding of deportation pursuant to Section 243(h) of the Act an alien must show a clear probability of persecution in the country designated for deportation on account of race, religion, nationality, membership in a particular social group or political opinion. The alien must show that it is more likely than not he or she would be subject to persecution on one of the grounds specified.

An applicant for asylum under Section 208 of the Act must meet the definition of a refugee which requires him or her to show persecution or a well-

founded fear of persecution of a particular country on account of race, religion, nationality, membership in a particular social group or political opinion. The statutory standard requires the alien to show that he possesses a well-founded fear of persecution by establishing that a reasonable person in his circumstances would fear persecution if he were to be returned to his native country.

In this particular case the respondent bases his application for asylum upon the fact that he is a christian and that he is opposed to the Sandinista regime, and furthermore that he was politically and philosophically opposed to the government of Nicaragua. So [he] therefore asks for political asylum based upon his christian and political philosophy. Now, the respondents do bear the burden of proof in both asylum and withholding applications to establish that they are deserving of the relief.

Now, in this particular case the respondent has testified of three times when he was arrested as a youth and held and obviously also tortured. He was ultimately released and allowed to go free, and even was allowed to work for the government and also to go to Radiology School. The respondent fears returning to Nicaragua and fears that he will be persecuted because of the fact that he deserted and he will possibly be incarcerated and may even disappear, which was a synonym for being killed.

Now, he also notes that although there is a new government in Nicaragua that the government is still controlled by the Sandinista government. There was also an individual, Mr. Bayardo Jiron, who testified that he was a former general in the army. He was head of the national security, equivalent to the CIA and the FBI, and that he believes that there is still a

draft even though President Chamorro says otherwise. People are taken into the army against their will and that basically the Chamorro government is really not in control. It was really her son-in-law who is a Sandinista along with the head of the army, which is the brother of Daniel Ortega, that basically controls the government.

Now, it is noted that although the respondent did desert from the military that a sovereign government does have a right to carry on a draft, and it is noted that a sovereign government does not engage in persecution when it drafts its citizens in order to raise an army and protect the army. *See Matter of Vigil*, Int. Dec. 3050 cited 17 March 1988 by the Board of Immigration Appeals. So the fact that one requires conscription or mandatory military service does not give one a right to depart that army. When one does take it upon himself to depart the military when he is serving in that military that it is incumbent upon him to show that such was necessary, because otherwise when the government would take him into tow for trial for desertion it would not be persecution but it would be prosecution, as most countries forbid an[d] outlaw desertion from the military.

Now, it is also noted that the respondent stated that basically that he was opposed to pretty much the military service based upon religious reasons and it is noted that the respondent has not established a well-founded fear of persecution due to the fact that there is no exemption in the draft law of Nicaragua, even for religious objectors, as decided in the *Matter of Canos*, Int. Dec. 3074 cited in 1988. Now absent an intent of persecution of the religious or the carrying out of a law that is carried out in a persecutory manner, the fact that there is no exemption for christians or

otherwise does not create a fear of persecution or a well-founded fear of persecution as set out in either 208 or 243(h).

Now, the respondent basically states that he left the military because of the fact that they were carrying out acts that were against his conscience and basically against the laws of the land. They were killing people, they were abusing people and they were carrying on a drug trade within the military.

However, it is noted that since the respondent has departed his country, and this Court does take administrative notice that the Sandinista Party no longer controls the Nicaraguan government, that effective April 25, 1990 a new coalition government formed by parties in opposition to the Sandinistas known as UNO has succeeded the former government of the Sandinista Party. There were national elections and the people in Nicaragua put in the UNO government headed by President Violeta Chamorro. Furthermore, President Chamorro has announced a general amnesty covering the hostilities between the former contra resistance and the Nicaraguan government. Also President Chamorro has put in effect amnesty for all of those who have deserted the army and also has done away with the military draft.

Now, it is noted that one of the witnesses today, Mr. Bayardo Jiron, testified that there is a draft and testified that the amnesty, although in place, really was not effective. However, I must state that I think that Mr. Bayardo Jiron is obviously a very good person and a very honest person I do question the basis of his statements. He stated that he has never been back to Nicaragua since his departure in 1979 and his contact was with lawyers who were trying to attempt to get back in land in Nicaragua. So, I

question the basis of his comments that that the amnesty is ineffectual and that doing away with the draft is also ineffectual. *Time Magazine, Newsweek Magazine,* all the news articles seem to indicate that the draft has been done away with. Furthermore that the amnesty is in effect for all those deserters and anyone who left and I have, other than Mr. Jiron's comments today, seen nothing to the contrary to support him. Likewise, the State Department, the Federal government all seem to believe that the amnesty is in effect and also there is no longer a draft. So a great weight of evidence is against Mr. Jiron, although I do believe that Mr. Jiron is a very honest and very honorable person.

It is also noted that I find that the respondent is a very credible person and I have no reason to doubt the testimony of the respondent. However, because of the significant change of events in Nicaragua, there's been a significant difference, change of events, in Nicaragua I do not believe that the respondent qualifies for either 208 or 243(h).

The respondent asks that he be given a humanitarian grant of asylum, it's under the *Matter of Chen.* However, I don't think that would be appropriate either.

The respondent has asked for permission to [de]part the United States voluntarily in lieu of an order of deportation and I will grant this minimal form of relief because he appears to be certainly deserving of this relief.

ORDER

IT IS ORDERED that the respondent shall be granted voluntary departure on or before the 30th day of July 1991 or any extension beyond such date as may

be granted by the District Director of the Immigration and Naturalization Service and under such conditions as he shall direct. This allow the respondent an opportunity to put his personal affairs in order and that's why I've given such a period until July.

IT IS FURTHER ORDERED that if the respondent fails to depart when and as required the privilege of voluntary departure shall be withdrawn without further notice or proceedings and the following order shall thereupon become effective immediately: the respondent shall be deported from the United States to his native country of Nicaragua based upon the evidence in the record of proceedings.

IT IS FURTHER ORDERED that the request for political asylum, withholding of deportation pursuant to Sections 208 and 243(h) be denied.

/s/ R. KEVIN MCHUGH
R. KEVIN MCHUGH
Immigration Judge